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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
25 Street, N.W.
Washington, D.C. 20536

[redacted]

File: WAC 01 276 58674 Office: California Service Center Date: FEB 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition and continuing.

On appeal, the petitioner submits a letter and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, and continuing. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $11.55 per hour which equates to $24,024.00 per annum.

On May 23, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage, to include annual reports, complete copies of tax returns, or audited financial statements.

In response, counsel submitted copies of the petitioner's 1998, 1999, 2000, and 2001 Internal Revenue Service (IRS) Forms 1120S. Forms 1120S showed ordinary income of $21,918; -$17,042; $1,437; and -$27,343 respectively.

In determining the petitioner's ability to pay the proffered wage, CIS will ordinarily examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The director determined that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of the beneficiary's IRS Form W-2 Wage and Tax Statements which show that the petitioner employed and actually paid him wages of $24,374.78 in 1999; $21,908.28 in 2000; and $22,753.49 in 2001.

Counsel submits a letter from the petitioner which states that the company has been paying the beneficiary $10.15 per hour and is willing to pay the proffered wage of $11.55 per hour upon approval of the beneficiary's employment authorization document.

The tax return for 1998 shows ordinary income of $21,918.00 and net current assets of $7,903.00. Neither amount would have been sufficient to pay the proffered wage of $24,024.00 in 1998.

The petitioner has established that it paid the beneficiary a salary in excess of the proffered wage in 1999; however, the beneficiary was paid less than the proffered wage in 2000 and 2001, and the petitioner's ordinary income on the tax returns for 2000 and 2001 are not sufficient to make up the difference. The tax return for 2000 shows ordinary income of $1,437 while the tax

return for 2001 shows ordinary income of -$27,343. Furthermore, the petitioner could not have made up the difference in either year from its net assets. In both years, the petitioner's liabilities exceeded its assets.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.